


UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

UNITED STATES OF AMERICA,	§	
	§	
VS.	§	CRIMINAL ACTION NO. 4:15-CR-0015
	§	
RICHARD ARTHUR EVANS, M.D.,	§	
	§	
Defendants.	§	

**INSTRUCTIONS TO THE JURY**

The following instructions were presented to the jury on the 25<sup>th</sup> day of July, 2016.

SIGNED and ENTERED this 25<sup>th</sup> day of July, 2016.

  
Kenneth M. Hoyt  
United States District Judge

**I.**

**INTRODUCTION TO FINAL INSTRUCTIONS**

Members of the Jury:

In any jury trial there are, in effect, two judges. I am one of the judges; the other is the jury. It is my duty to preside over the trial and to decide what evidence is proper for your consideration. It is also my duty at the end of the trial to explain to you the rules of law that you must follow and apply in arriving at your verdict.

First, I will give you some general instructions which apply in every case, for example, instructions about burden of proof and how to judge the believability of witnesses. Then I will give you some specific rules of law about this particular case, and finally I will explain to you the procedures you should follow in your deliberations.

**DUTY TO FOLLOW INSTRUCTIONS**

You, as jurors, are the judges of the facts. But in determining what actually happened—that is, in reaching your decision as to the facts—it is your sworn duty to follow all of the rules of law as I explain them to you.

You have no right to disregard or give special attention to any one instruction, or to question the wisdom or correctness of any rule I may state to you. You must not substitute or follow your own notion or opinion as to what the law is or ought to be. It is your duty to apply the law as I explain it to you, regardless of the consequences.

It is also your duty to base your verdict solely upon the evidence, without prejudice or sympathy. That was the promise you made and the oath you took before being accepted by the parties as jurors, and they have the right to expect nothing less.

**PRESUMPTION OF INNOCENCE,  
BURDEN OF PROOF, REASONABLE DOUBT**

The indictment or formal charge against a defendant is not evidence of guilt. Indeed, a defendant is presumed by the law to be innocent. The defendant begins with a clean slate. The law does not require a defendant to prove his innocence or produce any evidence at all. The defendant has an absolute right not to testify. The fact that the defendant did not testify should not be considered by you in any way in arriving at your verdict.

The government has the burden of proving a defendant guilty beyond a reasonable doubt, and if it fails to do so, you must acquit the defendant. While the government's burden of proof is a strict or heavy burden, it is not necessary that the defendant's guilt be proved beyond all possible doubt. It is only required that the government's proof exclude any "reasonable doubt" concerning the defendant's guilt.

A "reasonable doubt" is a doubt based upon reason and common sense after careful and impartial consideration of all the evidence in the case. Proof beyond a reasonable doubt, therefore, is proof of such a convincing character that you would be willing to rely and act upon it without hesitation in the most important of your own affairs.

### **EVIDENCE—EXCLUDING WHAT IS NOT EVIDENCE**

As I told you earlier, it is your duty to determine the facts. To do so, you must consider only the evidence presented during the trial. Evidence is the sworn testimony of the witnesses, including stipulations, and the exhibits. The questions, statements, objections, and arguments made by the lawyers are not evidence.

The function of the lawyers is to point out those things that are most significant or most helpful to their side of the case, and in so doing to call your attention to certain facts or inferences that might otherwise escape your notice. In the final analysis, however, it is your own recollection and interpretation of the evidence that controls in the case. What the lawyers say is not binding upon you.

During the trial if I sustained objections to certain questions and exhibits, you must disregard those questions and exhibits entirely. Do not speculate as to what the witness would have said if permitted to answer the question or as to the contents of an exhibit. Do not consider any testimony or other evidence that has been removed from your consideration in reaching your decision. Your verdict must be based solely on the legally admissible evidence and testimony.

Also, do not assume from anything I may have done or said during the trial that I have any opinion concerning any of the issues in this case. Except for the instructions to you on the law, you should disregard anything I may have said during the trial in arriving at your own verdict.

### **INFERENCES – DIRECT AND CIRCUMSTANTIAL**

In considering the evidence, you are permitted to draw such reasonable inferences from the testimony and exhibits as you feel are justified in the light of common experience. In other words, you may make deductions and reach conclusions that reason and common sense lead you to draw from the facts which have been established by the evidence.

Do not be concerned about whether evidence is “direct evidence” or “circumstantial evidence.” You should consider and weigh all of the evidence that was presented to you.

“Direct evidence” is the testimony of one who asserts actual knowledge of a fact, such as an eye witness. “Circumstantial evidence” is proof of a chain of events and circumstances indicating that something is or is not a fact.

The law makes no distinction between the weight you may give to either direct or circumstantial evidence. But the law requires that you, after weighing all of the evidence, whether direct or circumstantial, be convinced of the guilt of the defendant beyond a reasonable doubt before you can find him guilty.

### **CREDIBILITY OF WITNESSES**

In determining whether the government has proved the guilt of the defendant beyond a reasonable doubt, you must consider all of the evidence. This does not mean, however, that you must accept all of the evidence as true or accurate. You are the sole judges of the credibility or “believability” of each witness and the weight to be given to the witness’s testimony. An important part of your job will be making judgments about the testimony of the witnesses who

testified in this case. You should decide whether you believe all, some part, or none of what each person had to say, and how important that testimony was. In making that decision I suggest that you ask yourself a few questions: Did the witness impress you as honest? Did the witness have any particular reason not to tell the truth? Did the witness have a personal interest in the outcome of the case? Did the witness have any relationship with either the government or the defense? Did the witness seem to have a good memory? Did the witness clearly see or hear the things about which he or she testified? Did the witness have the opportunity and ability to understand the questions clearly and answer them directly? Did the witness's testimony differ from the testimony of other witnesses? These are a few of the considerations that will help you determine the accuracy of what each witness said.

Your job is to think about the testimony of each witness you have heard and decide how much you believe of what each witness had to say. In making up your mind and reaching a verdict, do not make any decisions simply because there were more witnesses on one side than on the other. Do not reach a conclusion on a particular point just because there were more witnesses testifying for one side on that point. You will always bear in mind that the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

### **CHARACTER EVIDENCE**

Where a defendant has offered evidence of good general reputation for truth and veracity, honesty and integrity, or character as a law-abiding citizen, you should consider such evidence along with all the other evidence in the case.

Evidence of a defendant's character, inconsistent with those traits of character ordinarily involved in the commission of the crime charged, may give rise to a reasonable doubt, since you may think it improbable that a person of good character with respect to those traits would commit such a crime.

You must bear in mind, however, that the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

### **ON OR ABOUT**

You will note that the indictment charges that the offense was committed on or about a specified date. The government does not have to prove that the crime was committed on that exact date, so long as the government proves beyond a reasonable doubt that the defendant committed the crimes on a date reasonably near January 1, 2008 through December 31, 2013, the dates stated in the indictment.

### **CONSIDER ONLY CRIME CHARGED**

You are here to decide whether the government has proved beyond a reasonable doubt that the defendant is guilty of the crimes charged. The defendant is not on trial for any act,

conduct, or offense not alleged in the indictment. Neither are you called upon to return a verdict as to the guilt of any other person or persons not on trial as a defendant in this case.

### **PUNISHMENT**

If a defendant is found guilty, it will be my duty to decide what the punishment will be. You should not be concerned with punishment in any way. It should not enter your consideration or discussion.

### **MULTIPLE COUNTS**

A separate crime is charged in each count of the indictment. Each count and the evidence pertaining to it should be considered separately. The fact that you may find the defendant guilty or not guilty as to one of the crimes charged should not control your verdict as to any other.

### **THE INDICTMENT**

The defendant is formally charged in an Indictment. An Indictment is simply a charge or accusation, it is not evidence. In this case, the defendant is charged in a multiple count indictment with the offenses of conspiracy to distribute narcotics and to commit mail fraud, distribution of narcotics, mail fraud, and money laundering. I will address these crimes and the elements of each offense later in these instructions.

### **ACCOMPLICE—CO-DEFENDANT—PLEA AGREEMENT**

In this case the government called, David DeVido, as one of its witnesses an alleged accomplice, named as a co-defendant in the indictment and with whom the government has entered into a plea agreement. This agreement provides for the dismissal of some charges and a



non-binding recommendation for a favorable sentence. Such plea bargaining, as it is called, has been approved as lawful and proper, and is expressly provided for in the rules of this court.

An alleged accomplice, including one who has entered into a plea agreement with the government, is not prohibited from testifying. On the contrary, the testimony of such a witness may alone be of sufficient weight to sustain a verdict of guilty. You should keep in mind that such testimony is always to be received with caution and weighed with great care. You should never convict a defendant upon the unsupported testimony of an alleged accomplice unless you believe that testimony beyond a reasonable doubt. Moreover, the fact that an accomplice has entered a plea of guilty to the offense charged is not evidence of the guilt of any other person.

#### **WITNESS' USE OF ADDICTIVE DRUGS**

In this case, the government called as witnesses persons who may have used addictive drugs. The testimony of a witness who is shown to have used addictive drugs during the period of time about which the witness testified must always be examined and weighed by the jury with greater care and caution than the testimony of ordinary witnesses. You should never convict any defendant upon the unsupported testimony of such a witness unless you believe that testimony beyond a reasonable doubt.

#### **EXPERT OPINION TESTIMONY**

During the trial you heard the testimony of expert witnesses, Doctors Graves Owen and Sanford Epstein, who expressed opinions concerning the defendant's medical practice. If scientific, technical, or other specialized knowledge might assist the jury in understanding the

evidence or in determining a fact in issue, a witness qualified by knowledge, skill, experience, training, or education may testify and state an opinion concerning such matters.

Merely because such a witness has expressed an opinion does not mean, however, that you must accept that opinion. You should judge such testimony like any other testimony. You may accept it or reject it and give it as much weight as you think it deserves, considering the witness' education and experience, the soundness of the reasons given for the opinion, and all other evidence in the case.

### **IMPEACHMENT BY PRIOR CONVICTION**

You have also heard testimony that certain witnesses were convicted of felony offenses or crimes involving moral turpitude. A conviction is a factor you may consider in deciding whether to believe that witness, but it does not necessarily destroy the witness' credibility. It has been brought to your attention only because you may wish to consider it when you decide whether you believe the witness' testimony. It is not evidence of anything else.

### **IMPEACHMENT BY PRIOR INCONSISTENCIES**

The testimony of a witness may be discredited by showing that the witness testified falsely, or by evidence that at some other time the witness said or did something, or failed to say or do something, which is inconsistent with the testimony the witness gave at this trial.

Earlier statements of a witness were not admitted in evidence to prove that the contents of those statements are true. You may only use earlier statements to determine whether you think the earlier statements are consistent or inconsistent with the trial testimony of the

witness and therefore whether they affect the credibility of that witness.

If you believe that a witness has been discredited in this manner, it is your exclusive right to give the testimony of that witness whatever weight you think it deserves.

### **SUMMARIES AND CHARTS RECEIVED IN EVIDENCE**

Certain charts and summaries have been received in evidence. You should give them only such weight as you think they deserve.

### **DELIBERATE IGNORANCE**

You may find that the defendant had knowledge of a fact if you find that the defendant deliberately closed his eyes to what would otherwise have been obvious to him. While knowledge on the part of the defendant cannot be established merely by demonstrating that the defendant was negligent, careless, or foolish, knowledge can be inferred if the defendant deliberately blinded himself to the existence of a fact. The deliberate ignorance instruction “does not lessen the government’s burden to show, beyond a reasonable doubt, that the knowledge elements of the crimes have been satisfied.

### **“KNOWINGLY”—TO ACT**

The word “knowingly,” as that term has been used from time to time in these instructions, means that the act was done voluntarily and intentionally, not because of mistake or accident.

## II.

### CONSPIRACY UNDER 18 U.S.C. § 371

The defendant is charged in Count 1 of the indictment with conspiracy in violation of Title 18, United States Code, Section 371. Title 18, United States Code, Section 371 makes it a crime for anyone to conspire with someone else to commit an offense against the laws of the United States.

The defendant is charged with conspiring to commit an offense against the United States, specifically, to knowingly distribute controlled substances, namely oxycodone, a Schedule II controlled substance, outside the course of professional practice and not for a legitimate medical purpose, and knowingly devising a scheme and artifice to defraud and obtain money by means of material false and fraudulent pretenses, representations, and promises for the purpose of executing said scheme and artifice, and in attempting to do so, placed and caused same to be placed in a post office or authorized depository for mail.

A “conspiracy” is an agreement between two or more persons to join together to accomplish some unlawful purpose. It is a kind of “partnership in crime” in which each member becomes the agent of every other member.

For you to find a defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

*First:* That the defendant and at least one other person agreed to commit the crime of distribution of oxycodone outside the course of professional practice and not for a legitimate medical purpose and to obtain money; and

*Second:* That the defendant knew the unlawful purpose of the agreement, and joined in the agreement willfully, that is, with the intent to further the unlawful purpose.

*Third:* That one of the conspirators during the existence of the conspiracy knowingly committed at least one of the overt acts described in the indictment, in order to accomplish some object or purpose of the conspiracy.

One may become a member of a conspiracy without knowing all the details of the unlawful scheme or the identities of all the other alleged conspirators. If a defendant understands the unlawful nature of a plan or scheme and knowingly and intentionally joins in that plan or scheme on one occasion, that is sufficient to convict him for conspiracy even though the defendant had not participated before and even though the defendant played only a minor part.

The government need not prove that the alleged conspirators entered into any formal agreement, nor that they directly stated between themselves all the details of the scheme. Similarly, the government need not prove that all the details of the scheme alleged in the indictment were actually agreed upon or carried out. Nor must it prove that all the persons alleged to have been members of the conspiracy were such, or that the alleged conspirators actually succeeded in accomplishing their unlawful objectives.

Even with knowledge that a crime is being committed, or the mere fact that certain persons may have associated with each other, and may have assembled together and discussed common aims and interests, does not necessarily establish proof of the existence of a conspiracy. A person who has no knowledge of a conspiracy, but who happens to act in a way which advances some purpose of a conspiracy, does not thereby become a conspirator.

**AIDING AND ABETTING (AGENCY)**  
**18 U.S.C. § 2**

The guilt of a defendant in a criminal case may be established without proof that the defendant personally did every act constituting the offense alleged. The law recognizes that, ordinarily, anything a person can do for himself may also be accomplished by him through the direction of another person as his or her agent, or by acting in concert with, or under the direction of, another person or persons in a joint effort or enterprise.

If another person is acting under the direction of the defendant or if the defendant joins another person and performs acts with the intent to commit a crime, then the law holds the defendant responsible for the acts and conduct of such other persons just as though the defendant had committed the acts or engaged in such conduct.

Before any defendant may be held criminally responsible for the acts of others, it is necessary that the accused deliberately associate himself in some way with the crime and participate in it with the intent to bring about the crime.

Of course, mere presence at the scene of a crime and knowledge that a crime is being committed are not sufficient to establish that a defendant either directed or aided and abetted the crime unless you find beyond a reasonable doubt that the defendant was a participant and not merely a knowing spectator.

In other words, you may not find any defendant guilty unless you find beyond a reasonable doubt that every element of the offense as defined in these instructions was committed by some person or persons, and that the defendant voluntarily participated in its commission with the intent to violate the law.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

- First:* That the offense of conspiracy to distribute narcotics and commit mail fraud was committed by some person;
- Second:* That the defendant associated with the criminal venture;
- Third:* That the defendant purposefully participated in the criminal venture;  
and
- Fourth:* That the defendant sought by action to make that venture successful.

“To associate with the criminal venture” means that the defendant shared the criminal intent of the principal. This element cannot be established if the defendant had no knowledge of the principal’s criminal venture.

“To participate in the criminal venture” means that the defendant engaged in some affirmative conduct designed to aid the venture or assist the principal of the crime.

### III.

#### **DISTRIBUTION OF CONTROLLED SUBSTANCES 21 U.S.C. § 841(a)(1)**

In Counts 3 through 7, inclusive, the government charges that the defendant committed the offense of distribution of a controlled substance in violation of federal law. Title 21, United States Code, Section 841(a)(1), makes it a crime for anyone knowingly or intentionally to distribute a controlled substance. Oxycodone is a controlled substance within the meaning of this law.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

That the defendant knowingly distributed oxycodone outside the course of professional practice and not for a legitimate medical purpose.

To distribute a controlled substance in violation of federal law simply means that the defendant delivered or transferred a controlled substance to another person, with or without any financial interest in the transaction.

The government must prove, beyond a reasonable doubt, that the defendant prescribed oxycodone not in the usual course of medical practice and not for a legitimate medical purpose.

In making a medical judgment concerning the right treatment for an individual patient, physicians have discretion to choose among a range of available options. Therefore, in determining whether the defendant acted without a legitimate medical purpose, you should examine all of the defendant's actions and the circumstances surrounding them.



### **NO LEGITIMATE MEDICAL PURPOSE**

“Generally accepted or recognized” standard of medical practice describes a range of treatment for a medical condition that is recognized and accepted in the United States for a specified medical condition. It is an objective range of treatment as opposed to a subjective range.

For example, evidence that a doctor warns his patients to fill their prescriptions at different drug stores, or prescribes drugs without performing any physical examinations or only very superficial ones, or asks patients about the amount or type of drugs they want, may suggest that the doctor is not acting for a legitimate medical purpose and is outside the usual course of professional practice. These examples are neither exhaustive nor conclusive. They are simply meant to give you an idea of the kind of behavior from which you might conclude that a doctor was not prescribing drugs for a legitimate medical purpose and was not acting in the usual course of medical practice.

### **MAIL FRAUD 18 U.S.C. § 1341**

In Counts 8 through 11, inclusive, the government charges that the defendant committed the offense of mail fraud in violation of federal law. Title 18, United States Code, Section 1341, makes it a crime for anyone to use the mails or any private or commercial interstate carrier in carrying out a scheme to defraud.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

- First:* That the defendant knowingly devised or intended to devise a scheme to defraud by using the U.S. mail or a private commercial carrier to distribute oxycodone outside the course of professional practice and not for a legitimate medical purpose, and for monetary gain;
- Second:* That the scheme to defraud employed false material representations;
- Third:* That the defendant mailed something and caused something to be delivered through the United States Postal Service, or a private or commercial interstate carrier for the purpose of executing such scheme or attempting so to do; and
- Fourth:* That the defendant acted with a specific intent to defraud.

A “scheme to defraud” means any plan, pattern, or course of action intended to deprive another of money or property. It can also involve any scheme to deprive a governmental agency of the intangible right to honest services.

A “specific intent to defraud” means a conscious, knowing intent to deceive or cheat someone.

A representation is “false” if it is known to be untrue or is made with reckless indifference as to its truth or falsity. A representation would also be “false” if it constitutes a half truth, or omits or conceals a material fact, provided it is made with the intent to defraud.

A representation is “material” if it has a natural tendency to influence, or is capable of influencing, the decision of the person or entity to which it is addressed.

It is not necessary that the government prove all of the details alleged in the indictment concerning the precise nature and purpose of the scheme. What must be proved beyond a reasonable doubt is that the defendant knowingly devised or intended to devise a scheme to defraud by means of false or fraudulent pretenses, representations, or promises that was substantially the same as the one alleged in the indictment.

It is also not necessary that the government prove that the mailed material sent by private or commercial interstate carrier was itself false or fraudulent, or that the use of the mail or private or commercial interstate carrier was intended as the specific or exclusive means of accomplishing the alleged fraud. What must be proved beyond a reasonable doubt is that the use of the mails or private or commercial interstate carrier was closely related to the scheme because the defendant either mailed something or caused it to be mailed.

To “cause” the mails or private or commercial interstate carrier to be used is to do an act with knowledge that the use of the mails or private or commercial interstate carrier will follow in the ordinary course of business or where such use can reasonably be foreseen even though the defendant did not intend or request the mails, private or commercial interstate carrier, to be used.

Each separate use of the mails or a private or commercial interstate carrier in furtherance of a scheme to defraud by means of false or fraudulent pretenses, representations, or promises constitutes a separate offense.

**ENGAGING IN MONETARY TRANSACTIONS**  
**(18 U.S.C. § 1957)**

The government charges the defendant, in Counts 20 – 24 inclusive, of engaging in money laundering in violation of federal law. Title 18, United State Code, Section 1957, makes it a crime for a person to knowingly engage in, or attempt to engage in, a monetary transaction in excess of \$10,000, where the proceeds have been derived from specified criminal activity.

For you to find the defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

- First:* that the defendant knowingly engaged in a monetary transaction;
- Second:* that the monetary transaction was of a value greater than \$10,000;
- Third:* that the monetary transaction involved proceeds derived from specified unlawful activity;
- Fourth:* that the defendant knew that the monetary transaction involved proceeds from specified unlawful activity; and
- Fifth:* that the monetary transaction took place within the United States.

The term specified unlawful activity refers to a knowing distribution of a controlled substance, namely oxycodone, outside the course of professional practice and not for a legitimate medical purpose.

The government is not required to prove that the defendant knew that the offenses from which the monetary proceeds were derived constituted “specific unlawful activity” as defined by the statute creating this offense. The government must prove, however, that the

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defendant knew that the involved monetary proceeds were obtained or derived from the knowing distribution of a controlled substance outside the course of professional practice and not for a legitimate medical purpose.

### **GOOD FAITH DEFENSE**

Good faith is a complete defense to a charge that requires proof of intent on the part of a physician charged with unlawfully prescribing drugs. The government must prove that the defendant intended to prescribe oxycodone outside the course of professional practice and not for a legitimate medical purpose.

In considering the government's burden of proof, you the jury, must consider whether the defendant, in prescribing oxycodone, acted outside the course of professional practice and not for a legitimate medical purpose in violation of law. Good faith is not merely a doctor's sincere intention towards the people who come to see him; it also involves his sincerity in prescribing oxycodone within the course of professional practice and for a legitimate medical purpose as generally accepted in this country.

### **DUTY TO DELIBERATE—VERDICT FORM**

To reach a verdict, whether it is guilty or not guilty, all of you must agree. Your verdict must be unanimous on each count of the indictment. Your deliberations will be secret. You will never have to explain your verdict to anyone.

It is your duty to consult with one another and to deliberate in an effort to reach agreement if you can do so. Each of you must decide the case for yourself, but only after an impartial consideration of the evidence with your fellow jurors. During your deliberations, do not hesitate to re-examine your own opinions and change your mind if convinced that you were wrong. But do not give up your honest beliefs as to the weight or effect of the evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

Remember at all times, you are judges—judges of the facts. Your duty is to decide whether the government has proved the defendant guilty beyond a reasonable doubt.

When you go to the jury room, the first thing that you should do is select one of your number as your foreperson, who will help to guide your deliberations and will speak for you here in the courtroom.

A verdict form has been prepared for your convenience.

The foreperson will write the unanimous answer of the jury in the space provided for each count of the indictment, either guilty or not guilty. At the conclusion of your deliberations, the foreperson should date and sign the verdict.

If you need to communicate with me during your deliberations, the foreperson should write the message and give it to the court security officer. I will either reply in writing or bring you back into the court to answer your message.

Bear in mind that you are never to reveal to any person, not even to the court, how the jury stands, numerically or otherwise, on any count of the indictment, until after you have reached a unanimous verdict.